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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1947

INTERNATIONAL SALT COMPANY, INCORPORATED,
APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 26), is reported in 6 F. R. D. 302 (1946).

JURISDICTION

The judgment of the court below was entered December 27, 1946 (R. 36). The order of that court allowing this appeal was entered January 23, 1947 (R. 42). The jurisdiction of this Court is invoked under Sec. 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. See. 29), and Sec. 238 of the Judicial Code, as amended (36 Stat. 1157, 38

Stat. 804, 43 Stat. 938, 28 U. S. C. Sec. 345). This Court noted probable jurisdiction on April 28, 1947 (R. 50).

QUESTIONS PRESENTED

The appellant leased its patented machines to many lessees on condition that the lessees use in the machines only the unpatented salt produced by the patentee. The questions are (1) whether such tying clauses are on their face, or *per se*, violative of the Sherman Act, (2) even if not, whether, in view of the substantial magnitude of the restraints, violation of Section 1 of the Sherman Act or Section 3 of the Clayton Act is shown, and (3), whether Paragraph VI of the judgment, imposing upon appellant the requirement that it dispose of its machines in a non-discriminatory manner, was an abuse of the discretion of the District Court.

STATUTES INVOLVED

The complaint, Paragraph 1, alleges that this action is brought under Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209 (15 U. S. C. Sec. 1), and Sec. 3 of the Clayton Act, 28 Stat. 730 (15 U. S. C. Sec. 14). Section 1 of the Sherman Anti-Trust Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *

Section 3 of the Clayton Act provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charge therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT

The United States District Court for the Southern District of New York sustained a motion for summary judgment made by the plaintiff below, United States of America, and enjoined appellant, defendant below, International Salt Company, Incorporated, from further violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act (R. 25, 36).

The facts upon which the District Court granted summary judgment[1] are found in the allegations in the complaint (R. 3), insofar as they are admitted in the answer (R. 14–16); the allegations of the affirmative defense set forth in defendant's answer (R. 16–19); and the admissions made by the defendant, in response to a Request for Admissions filed by plaintiff below, under Rule 36 of the Federal Rules of Civil Procedure (R. 20, 23).[2]

The essential facts are as follows:

Appellant, International Salt, is a New Jersey corporation with offices in New York City. It manufactures and supplies in interstate commerce salt for industrial, agricultural and home purposes (R. 14, 15) and is the largest producer of salt for industrial uses in the United States (R. 14).

It also engages in the distribution of two types of machines, the "Lixator" and the "Saltomat," both of which are manufactured under patents which it owns (R. 4, 23). It leases both machines on condition that the lessees purchase from appellant unpatented salt and salt tablets used in said machines (R. 15, 11–13).

[1] Although in form the case arises on motion for summary judgment, in fact the procedure was in the nature of a motion for judgment on the pleadings.

[2] These include photostatic copies of 50 Lixator leases, made a part of the record and filed with the Court but not printed, which vary from the 790 Lixator leases made on the standard printed form of lease agreement (R. 47–48).

In 1944, appellant sold approximately 119,000 tons of salt having a value of approximately $500,000 for use in said Lixator and Saltomat machines (R. 16). Salt in many respects similar to that made and sold by the appellant is and has been sold by other companies in competition with the salt products of the appellant (R. 15).

The Lixator Leases. The Lixator is a machine manufactured by appellant which dissolves rock salt, sold by appellant and others, into a salt brine solution which is essential in certain industrial processes, such as meat packing, refrigeration, and laundering (R. 4, 14).

Appellant, at the time of the action before the District Court, had entered into 840 agreements, each leasing a Lixator to certain persons and concerns (R. 20, 23). 790 of these agreements were on appellant's standard form (R. 20, 23). See Exhibit A of the Complaint (R. 11). For the 50 non-standard leases, for which the rental appears in the record, the lease was at a specified, and in many cases nominal, annual rental, and after five years was reduced to $1.00 per annum. Lessee was responsible for maintenance and repair.

The standard lease contained the following provisions (R. 11–12):

> * * * that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:

> If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price.
>
> * * * * * * *
>
> * * * that should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirements of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon thirty days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee.

Of the 50 Lixator agreements which differ from the printed form (R. 20, 23) (R. 47, 48), all but four contain tying clauses requiring the lessee to purchase some or all of the rock salt used in the Lixator from the appellant. The remaining 46 agreements contain modifications of little importance, such as variations in the facilities fur-

nished by lessor, in the rental or cancellation terms, etc. (R. 28, note 3). Three leases permitted lessee to buy 50% of its salt requirements from appellant's competitors, and five, all with one concern, permitted lessee to use salt produced by itself.

Appellant avers that it has sold the Lixator outright in many instances where the customer objected to leasing the machine, and without any restriction on the purchase of the rock salt for use therewith (R. 16), although in some instances it refused to sell machines (R. 16). It denies ever having refused to install a Lixator because the customer objected to signing a lease on the standard form (R. 16, 17), and asserts that in many instances lessees have purchased rock salt elsewhere in violation of the agreement without appellant removing or attempting or threatening to remove the machine from the possession of the lessee (R. 17).

The Saltomat Leases. The Saltomat machine, manufactured for appellant under a patent owned by it (R. 23), is used to inject salt in tablet form into canned products during the process of canning (R. 18). Appellant leases these Saltomats under a standard form of agreement, a copy of which is attached to the complaint as Exhibit B (R. 12–13, 15). At the time this action was before the District Court, appellant had in effect 73 leases covering 96 Saltomats, all in the standard

form (R. 20, 23). The leases were for one year, or part thereof, at a specified rental. Lessee was responsible for maintenance and repair. It was agreed that "the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, * * *." Appellant may terminate the lease on ten days' notice if lessee fails to buy its salt tablets for the Saltomat from it (R. 12–13).

Appellant has in some instances refused to sell Saltomat machines (R. 16), but denies ever having refused to install a Saltomat machine because the customer objected to signing a standard form (R. 16, 17).[6] All leased Saltomats, however, have been leased on the standard form (R. 20, 23), and it is not alleged that any have been sold. Appellant also states that Saltomat lessees have frequently purchased salt tablets from other sources, and that in no such case has appellant removed, or attempted or threatened to remove, the machine from the possession of such lessees (R. 17).

The standard lease contained the following provision:

[6] There is no allegation that any lessee of the Saltomat ever has objected.

> If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price.

The answer also alleges that appellant produces rock salt with a minimum of impurities, that such salt can be used more successfully in the two types of machines, and that to permit salt produced by others to be used in the machines will cause a loss of appellant's good will (R. 17–19).[4]

The Judgment. The District Court found that the provisions of the leases covering the Lixator and Saltomat machines which contained any conditions, agreements or understandings prohibiting the lessee from using or dealing in the salt of appellant's competitors were violative of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and declared them illegal and void (R. 36, 37).

The court enjoined appellant from: (a) enforcing or attempting to enforce such provisions; (b) entering into any agreements for said machines, or similar machines, upon the condition that the user shall not purchase, use or deal in the salt of a competitor of appellant; (c) participating in agreements which continue any agreement, condition, or understanding adjudged

[4] These facts are discussed at greater length, *infra*, pp. 34–41.

to be unlawful by this judgment; (d) removing said machines from the user's premises because of such user's purchase or use of salt manufactured or sold by anyone other than appellant; (e) using its patent rights embodying inventions used or useful in said machines to control the purchase of salt from anyone other than appellant; (f) instituting or threatening action for infringement, or to collect sums alleged to have accrued prior to the entry of said judgment under any United States patents owned or controlled by appellant relating to said machines or similar machines (R. 37–38).

Appellant is also directed (par. VI, R. 38–39) to lease, sell or license Lixator or Saltomat machines (or similar machines) to any applicant on non-discriminatory terms or conditions, subject to the following provisos: (a) that machines are available for such purposes; (b) that appellant need not make such offers unless it is offering such machines for lease or sale or license within the United States, and defendant may at any time discontinue the business of renting, selling or licensing the use of such machines; (c) that such sale, lease or license need not be made to any person not having the proper credit rating except on a cash or security basis; and (d) that the rental or sale price or royalties may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as

to any size or type of machine (R. 38–39). Any existing lessee may elect to retain its rights under the existing lease or enter into a new lease, sale or license contract with appellant in accordance with the provisions of this paragraph VI of the judgment (R. 38–39).

The United States asked the District Court for additional relief in order to dissipate the effect of the unlawful conduct (R. 9–10, 45). It took an appeal from the failure of the court to grant its requests (R. 44–46), but has since dismissed its appeal.

SUMMARY OF ARGUMENT

I

The tying clauses here unquestionably restrain competition, inasmuch as they prevent anyone from competing with appellant in its sales of salt for use in the leased machines. It is admitted that the trade restrained is interstate. Nor can it be claimed that the amount of commerce affected is unduly small. *United States* v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947. The issue under the Sherman Act thus is whether the restraint of trade is unreasonable.

A. In many cases, including the *Morton Salt* case, 314 U. S. 488, which is factually almost indistinguishable from that at bar, this Court has refused to enforce agreements in which owners of patents have attempted to require licensees to purchase unpatented goods solely from them.

Although these are not antitrust cases, the policy which the Court has invoked in deciding them is the same policy against interfering with competition which is embodied in the Sherman Act. And in the most recent of this series of decisions, the *Mercoid* cases, the Court held that use of a patent to control competition in the unpatented article was both unreasonable and unlawful under the antitrust laws. These authorities, in our view, establish that this type of restraint is unlawful on its face under the Sherman Act.

B. Even if the question be regarded as open under the authorities, the same conclusion is required. Methods of restraint which exclude from the market those who would otherwise supply it are unlawful *per se* under the Sherman Act. Price fixing is unlawful *per se* because it *eliminates* competition, and agreements which require the purchase of a commodity from a single producer eliminate competition just as clearly. The "rule of reason" establishes as the criterion whether restraints unduly impair the public interest in a competitive market. The patent cases holding these tying clauses to be unenforceable because contrary to public policy are dispositive of the argument that the same restraint may be "reasonable" under the Sherman Act, inasmuch as the public policies applied in the patent cases and underlying the "rule of reason" are the same.

The miscellaneous facts stressed by appellant do not justify the restriction. Appellant's failure to enforce the leases, or to impose it in all instances, and the provision in the Lixator agreements for meeting general price reductions do not establish effective competition. Nor does the fact that appellant's salt may be purer and for that reason more satisfactory in the machines make the tying clauses necessary for the potection of appellant's good will. The protection of good will in any event does not warrant an otherwise unlawful extension of a patent monopoly over unpatented products. *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 138–139.

C. Whether or not the type of restraint here involved was unlawful *per se*, the fact that appellant, the largest producer of salt for industrial use in the country, has excluded competitors from a market consisting of 119,000 tons of salt annually is sufficient to show a violation of the Sherman Act in the absence of circumstances showing the restraint not to be unreasonable.

II

The tying clauses violate section 3 of the Clayton Act, which forbids the leasing of machinery on the condition that the lessee shall not use the supplies of a competitor where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

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International Business Machines Corp. v. *United States*, 298 U. S. 131, in itself refutes appellant's argument that the section is inapplicable because the restriction in terms only applies to products used in appellant's machines. And there can be no question but that the effect of the tying clauses, which relate to 119,000 tons of salt used by over 900 machines, at least "may be" to substantially lessen competition or tend to create a monopoly. The restraint and monopoly need not be of an entire industry if the amount of trade affected is appreciable.

III

Paragraph VI of the judgment requires appellant to offer to lease, license or sell its machines covered by the patents on non-discriminatory terms so long as the machines are available and appellant is offering to lease, license, or sell them. This provision was necessary to prevent the appellant from using its ownership of the machines to force the purchase of its salt, or to give preference to those who would purchase salt from it. A mere injunction against discrimination would be insufficient, since it would require the difficult inquiry into the motive of appellant in disposing of particular machines. Paragraph VI is not harmful to appellant, since it permits appellant to decide whether it wishes to distribute machinery and the price thereof, so long as it treats all customers equally. It was not arbitrary or

an abuse of discretion for the District Court to find that such an affirmative requirement was essential for the protection of the industry against possible continuation of appellant's unlawful methods.

ARGUMENT

I

THE TYING CLAUSES VIOLATE SECTION 1 OF THE SHERMAN ACT

The foregoing statement of the facts, based on the pleadings and the admissions by appellant, shows that appellant has entered into two series of agreements relating to patented machines for using salt in industrial processes. Each series of agreements contains restrictive clauses requiring the lessee to purchase unpatented salt from appellant for use in the machine, subject to the penalty of cancellation and removal of the machine from the lessee if the lessee fails to comply with the restriction. Appellant has outstanding over 900 of these restrictive agreements. In 1944 appellant sold approximately 119,000 tons of salt, of the value of approximately $500,000, for use in these machines (R. 16). It is apparent that the restrictive provisions in the leases were designed to prevent sales by competitors. The agreements speak of "competitive" salt, and of competitive prices (R. 11).

There can be no question under these facts that the restrictive agreements restrain competition,

inasmuch as they prevent anyone from competing with appellant in its sales of salt for use in the leased machines. There is no dispute as to the trade restrained being interstate, inasmuch as it is conceded that appellant and its competitors ship salt in interstate commerce (R. 15).

Nor can it be claimed that the amount of commerce affected immunizes the restraint. The amount—119,000 tons of salt—is certainly not insubstantial. It is established that "the amount of interstate trade * * * affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged * * *. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, note 59, p. 225; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485. And § 2 of the Act makes it unlawful to conspire to monopolize "any part of interstate commerce," without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. * * *" *United States* v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947, slip opinion, p. 6.

The issue in this case is thus reduced to whether the restraint of trade is "unreasonable" within the meaning of the Sherman Act as it has been construed. It is the Government's primary posi-

tion that such a restraint is "unreasonable" on its face, *i. e.*, that it constitutes a *per se* violation of the Sherman Act.

A. BOTH PATENT AND ANTITRUST CASES DEMONSTRATE THAT PATENT LICENSES RESTRICTING THE SALE OF UNPATENTED ARTICLES ARE UNLAWFUL.

Since *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, was overruled by *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, this Court has refused to enforce agreements in which owners of patents sought to require licensees to purchase unpatented goods from them. *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 406–407. The patent cases in this series speak in the main of such agreements extending beyond the scope of the patent grant, so that their enforcement is contrary to the public interest. In the *Carbice* case, however, the Court, speaking through Mr. Justice Brandeis, defined the public interest which would be injured in a manner which makes it plain that he regarded it as indistinguishable from the interest protected by the Sherman Act. The opinion states (283 U. S., at 32):

* * * If a monopoly could be so expanded, the owner of a patent for a product might conceivably monopolize the commerce in a large part of unpatented materials used in its manufacture. The owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation. The owner of a patent for a process might secure a partial monopoly on the unpatented material employed in it. The owner of the patent in suit might conceivably secure a limited monopoly for the supplying not only of solid carbon dioxide, but also of the ice cream and other foods, as well as of the cartons in which they are shipped. *The attempt to limit the licensee to the use of unpatented materials purchased from the licensor is comparable to the attempt of a patentee to fix the price at which the patented article may be resold.* * * *

* * * * *

(p. 34):

* * * The present attempt is analogous to the use of a patent as an instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law, in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.*

* In such cases, the attempt to use the patent unreasonably to restrain commerce is not only beyond the scope of the grant, but also a direct violation of the Anti-Trust Acts. * * *

* All italics in this brief are supplied.

The *Morton Salt* case, decided in 1942, presented a factual situation almost identical with the instant case. The patentee in that case had leased patented machines for depositing salt tablets under an agreement that only the patentee's tablets could be used with the machine. This Court dismissed the patentee's infringement action against another maker of machines on the ground that the maintenance of the suit was "contrary to public policy" (314 U. S., at 494). The Court's opinion twice noted that it was "unnecessary to decide whether respondent has violated the Clayton Act" (pp. 494, 490), and these reservations are the bases for appellant's contention that the *Morton Salt* case by itself does not require a decision for the Government in the case at bar. But although the Court in that case did not find it necessary to decide whether the antitrust laws were violated, its language, its reasoning, and its citations indicate that the policy underlying the decision was the same as that of the Sherman Act. For the opinion states that it "appears that respondent is making use of its patent monopoly *to restrain competition* in the marketing of unpatented articles, salt tablets, for use with the patented machines, and *is aiding* in the *creation of a limited monopoly* in the tablets not within that granted by the patent." 314 U. S., at 491. The Court subsequently refers to the use of the patent "to suppress competition in the sale of an unpatented article" (*ibid.*), to the use of the

patent "as a means of restraining competition with the patentee's sale of an unpatented product" and as "thwarting the public policy underlying the grant of the patent" (p. 493), and to the restrictive agreement as an "improper practice" and as a "misuse of the patent" (p. 493).*

The door left open in the *Morton Salt* case was, we believe, closed in the *Mercoid* cases. *Mercoid Corp.* v. *Mid-Continent Investment Corp.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680. The *Mercoid* cases differed from the *Morton Salt* case in that in one of them Mercoid was seeking an injunction on the ground that the respondent was using the patent in violation of the antitrust laws (320 U. S., at 681). In the first case the Court followed the *Morton Salt* case in holding that a patentee seeking to control the sale of an unpatented product could not enforce the patent. The opinion states that (p. 667, 670): "But for the patent such restraint on trade would plainly run afoul of the anti-trust laws. * * * Such a vast power 'to multiply monopolies' at the will of the patentee * * * would carve out exceptions to the anti-trust laws which Congress has not sanctioned. * * * Should such a decree be entered, the Court would be placing its imprimatur

* It is to be observed that the *Morton Salt* case was decided upon a motion for summary judgment, and that the opinion does not rely on facts differing in nature from those contained in the record in the case at bar.

on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws. * * *"

The statements in the first case indicating clearly that the misuse of the patent privilege involved was a violation of the anti-trust laws were confirmed by the opinion in the second case, in which the point was squarely raised by reason of Mercoid's prayer for affirmative antitrust relief. The Court there unequivocally stated that (320 U. S., at 684):

> * * * The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law. For the reasons stated in *Mercoid* v. *Mid-Continent Investment Co., supra,* the effort here made to control competition in this unpatented device plainly violates the anti-trust laws, even apart from the price-fixing provisions of the license agreements. It follows that petitioner is entitled to be relieved against the consequences of those acts. It likewise follows that respondent may not obtain from a court of equity any decree which directly or indirectly helps it to subvert the public policy which underlies the grant of its patent. * * *

It is to be noted that although four justices dissented in the first *Mercoid* case on grounds unrelated to the point here in issue (320 U. S. 674–680), they joined in the decision in the second case (320 U. S., at 684), on the authority of

the *Morton Salt* case, which would seem to indicate that they regarded that case as controlling in relation to the prayer for injunctive relief under the antitrust laws as well as in relation to the refusal to grant affirmative relief to the misuser of the patent.

The *Mercoid* decisions are the latest cases (apart from *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, which involved other issues) to consider the precise question. Appellant relies, however, on two statements in *Transparent-Wrap Machine Corp.* v. *Stokes and Smith Co.,* 329 U. S. 637.[7] The *Transparent-Wrap* case is obviously not in point here, inasmuch as it involved the validity of a provision in a patent

[7] "* * * The requirement that a licensee under a patent use an unpatented material or device with the patent might violate the antitrust laws but for the attempted protection of the patent. [Citing *Mercoid Corp.* v. *Mid-Continent Corp.*, 320 U. S. at 667.] The condemnation of the practice, however, does not depend on such a showing. Though control of the unpatented article or device falls short of a prohibited restraint of trade or monopoly, it will not be sanctioned. *Morton Salt Co.* v. *Suppiger Co., supra.* For it is the tendency in that direction which condemns the practice and which, if approved by a court either through enjoining infringement or enforcing the covenant, would receive a powerful impetus. *Id.*" (329 U. S., at 641.)

"It is true that for some purposes the owner of a patent is under disabilities with which owners of other property are not burdened. Thus where the use of unpatented materials is tied to the use of a patent, a court will not lend its aid to enforce the agreement though control of the unpatented article falls short of a prohibited restraint of trade or monopoly. *Morton Salt Co.* v. *Suppiger Co., supra.*" (329 U. S., at 645.)

license agreement requiring the licensee to assign improvement patents to the patentee. The holding that such an agreement was not unlawful rested on a specific provision in the patent law making patents assignable. The Court found that the doctrine of the *Mercoid* and *Morton Salt* cases was inapplicable because of this factor. The remarks referred to by appellant, which are quoted in the note on the preceding page, merely state that the courts will not aid in enforcing agreements tying unpatented materials to the use of a patent "though control of the unpatented article falls short of a prohibited restraint of trade or monopoly," citing the *Morton Salt* case. These statements, read in the light of the fact that the Court found it unnecessary to decide the question of antitrust violation in the case cited, would seem to mean only that the Court will not enforce such agreements irrespective of the question of antitrust violation. Such an interpretation of the remarks is obviously most consistent with the unanimous holding of the Court in the second *Mercoid* case, as well as with the implications of the earlier *Carbice* and *Morton Salt* decisions, quoted *supra*, pp. 17–20.

Appellant also relies upon *Federal Tade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, and *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U. S. 3. The trial judge indicated that he would have based his decision in support of the Government on the ground that the "restric-

tive agreements were unlawful *per se*" if it were not for these two cases, which—although he believed the holdings to have "been severely restricted" (R. 32)—he apparently thought left the question sufficiently doubtful to cause him to rely upon a different ground for his decision (R. 32). Even assuming that the cases have continuing vitality they are inapplicable here.

The *Sinclair* case involved unpatented gasoline pumps and gasoline and the *Pick* case unpatented automobiles and automobile parts. In each case it clearly appeared that similar products could readily be obtained elsewhere. In the *Sinclair* case the court pointed out that many competitors produced pumps and that (261 U. S., at 474):

> * * * The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs.

(at 475):

> * * * the record does not show that the probable effect of the practice will be unduly to lessen competition. * * *

Finally, as the court below suggested (R. 33):

> * * * although unstated in the *Sinclair* case, it is nevertheless obvious that to allow a gasoline dealer to serve the public, through a Sinclair pump, gasoline other than Sinclair's would amount to cooperation in a fraud.

In the *Pick* case the Court accepted the finding of the two lower courts that requiring Chevrolet and Buick dealers to sell and use only General Motors parts would not be "substantially to lessen competition or to create a monopoly in any line of commerce" within the meaning of Section 3 of the Clayton Act. The Circuit Court of Appeals for the [redacted] Circuit had noted that "the record shows that competition in the sale of replacement parts for automobiles instead of growing less has substantially increased through the period during which the provisions complained of have been in force" (80 F. 2d, at 644). The manufacturer sought no control over any repairmen except its authorized dealers; all others were free to repair Chevrolets and Buicks with any parts they could obtain. In view of the competition from other sources not restricted by patents in both the *Sinclair* and *Pick* cases and the possible misrepresentation to the public, it is clear that those cases in no way resembles that at bar, even if it be assumed that other types of salt machines, not made under appellant's patents and therefore obviously not identical, per-

formed the same functions as appellant's machines.[8]

It is the Government's position that the cases discussed in this section of the brief establish that contractual provisions requiring patent licensees to purchase unpatented products from the patentee are on their face, and without more, violative of the Sherman Act. If it be assumed, however, that the point is not foreclosed by authority but is subject to fresh consideration (in view of the statements in the *Transparent-Wrap* case, *supra*, p. 22), we will show that the result for which we contend is a sound one.

B. LICENSE AGREEMENTS REQUIRING THE PURCHASE OF UNPATENTED PRODUCTS FROM A PATENTEE ARE IN AND OF THEMSELVES UNREASONABLE RESTRAINTS OF TRADE

1. The Exclusion of Competitors from the Sale of Unpatented Articles is Similar to other Restraints which Have Been Held Unreasonable per se

Although the Sherman Act, as construed by the Court, prohibits only "unreasonable" restraints of trade, it is established that certain methods of restraint are *per se* unreasonable. These include not only price fixing (*United States* v.

[8] The record is silent as to the existence of such competitive machinery. The opinion in the *Morton Salt* case indicates that another company was making a machine performing the same functions as the Saltomat. Appellant has not alleged that any other machines are comparable to or equally as good as those covered by its patents.

Socony Vacuum Oil Co., 310 U. S. 150, 212–218; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392), but such other restraints as combination boycotts which exclude persons from the market (*Fashion Originators' Guild* v. *Federal Trade Commission*, 114 F. 2d 80 (C. C. A. 2), affirmed, 312 U. S. 457, 467–468), and agreements not to compete in certain territories (*United States* v. *Addystone Pipe & Steel Co.*, 85 Fed. 271, 291 (C. C. A. 6, Taft, J.), affirmed, 175 U. S. 211; *United States* v. *Aluminum Co.*, 148 F. 2d 416, 427 (C. C. A. 2); *Pfotzer* v. *Aqua Systems*, 162 F. 2d 779, 784 (C. C. A. 2). As Judge L. Hand stated in the *Fashion Guild* case (114 F. 2d, at 85):

> Price fixing is not, however, the only means unlawful per se; the interest of the consumer is not all that determines the "reasonableness" of a contract "in restraint of trade." *It is also unlawful to exclude from the market any of those who supply it*—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain.

And in *United States* v. *Aluminum Co., supra*, Judge Hand, after reviewing the authorities, concluded that a monopoly was also illegal *per se* (148 F. 2d, at 427–428).

We submit that the use of a patent monopoly to prohibit those who desire the patented device from purchasing unpatented articles from competitors of the patentee falls in the same class. Where unpatented articles are tied to the lease of a patented machine, the patent becomes a lever to compel those who may need or desire the patented machine not to buy from the lessor's competitors in selling the unpatented product. The effect of appellant's agreements, unlawful under the patent laws, was to prevent other producers from competing in the sale of unpatented salt for use in the patented machines. Such an agreement is comparable in effect to an agreement to boycott competitors, which is illegal *per se* under the antitrust laws. In the *Fashion Originators Guild* case, this Court affirmed the action of the Federal Trade Commission in refusing to hear evidence as to the "reasonableness" of the boycott of style "pirates", saying (312 U. S., at 468):

> * * * Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination.

The fact that the exclusion of a certain class of persons from the market is accomplished in the one case by a voluntary combination and in

the other by the possessor of a patent monopoly acting outside the scope of his patent grant is of no significance. As Judge Hand stated in the *Aluminum* case (148 F. 2d 416, 428):

> there can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition.

In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458, and again in *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 218, this Court stated:

> Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act *because they eliminate competition*, * * *. [Italics supplied.]

Agreements which require purchase of a commodity from a single producer "eliminate competition" even more clearly than does the fixing of prices. Those who agree upon prices may compete in other ways (*American Tobacco Co.* v. *United States*, 328 U. S. 781), but when goods must be purchased from a single supplier no competition remains at all. We might rest our argument on this point upon the excerpt from the *Carbice* opinion (quoted *supra*, p. 18) that limiting "the licensee to the use of unpatented materials purchased from the licensor is comparable to the attempt of the patentee to fix the price at

which the patented article may be resold". Since the price fixing is unlawful *per se*, so should be the "comparable" practice.

2. The "Rule of Reason" does not Protect Restrictions which have been held Contrary to Public Policy because of their Effect upon Competition

The "rule of reason" adopted in *Standard Oil Co.* v. *United States*, 221 U. S. 1, was designed to insure that the antitrust law would not be construed blindly so as to strike down acts which merely restrained trade in a literal sense, but only to reach those restraints which contravene "the public policy embodied in the statute" (221 U. S., at 64, 66). More specifically, this Court has stated that under the rule of reason "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or *whether it is such as may suppress or even destroy competition.*" *Chicago Board of Trade* v. *United States*, 246 U. S. 231, at 238. "* * * only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interests by unduly restricting competition* or unduly obstructing the course of trade." *Nash* v. *United States*, 229 U. S. 373, 376; *Sugar Institute* v. *United States*, 297 U. S. 553, 598; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, and cases there cited. In other words the criterion under the rule of reason

is the effect upon the public interest in a competitive market. The cases in which this Court has held restraints not to be unreasonable are those in which it was of the view that competition would not be impaired or destroyed. See *Appalachian Coals, Inc.* v. *United States, supra; Chicago Board of Trade* v. *United States, supra; Window Glass Manufacturers* v. *United States,* 263 U. S. 403; *Maple Flooring Association* v. *United States,* 268 U. S. 563; *Standard Oil Co.* v. *United States,* 283 U. S. 163. Cf. *Sugar Institute* v. *United States,* 297 U. S. at 597–9.

It is manifest that when, as in this case, appellant's lessees agree to buy salt only from appellant, all competition in the sale of salt to them has been destroyed.[9] No competitor can enter the field which appellant has monopolized. Clearly, under the test enunciated in the cases applying the "rule of reason," restrictive covenants such as are here involved violate the law.

Since such expressions as "unreasonable" and "undue" do but little more than reflect conclusions based on other considerations, it is apparent

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[9] Appellant has alleged that in fact licensees of its machines have purchased salt for use in the machines from other sources, and that appellant has not threatened to remove the machines because of this (R. 17). This means merely that appellant, doubtless aware of the futility of any such attempt in view of this Court's decisions in the *Carbice* line of cases, has not sought to enforce the restrictions which it placed in its license agreements. This does not make the restrictions any the less unlawful.

that the rule of reason requires the exercise of a quantitative judgment as to whether a restraint too greatly impairs the public interest in competition. Whatever difficulty this process may entail in other situations is not present here. For, even if it be assumed that the cases running from *Motion Picture Patents* to *Mercoid* (discussed *supra*, pp. 17–21) are not decisive authorities under the Sherman Act, interpreted most narrowly they refuse to enforce the restrictive agreements, or to help patentees who have imposed such agreements, precisely because the agreements are "contrary to public policy" (*Morton Salt* case, 314 U. S., at 494). And these decisions, which refer repeatedly to "public policy" and the "public interest" (*Morton Salt* case, p. 492, *Mercoid* cases, 320 U. S., at 665, 670, 684), also make it plain that the public policy referred to is the policy against monopoly and favoring competition except to the extent that a patentee is acting within the lawful bounds of his patent grant. See *Morton Salt* case, 314 U. S., at 491, quoted *supra*, pp. 19–20, and other cases discussed *supra*, pp. 17–20.

The public policy which prohibits abuse of the patent privilege through extension of the patent monopoly beyond the confines of the grant and the policy of the antitrust laws are obviously the same. The court below aptly stated in this connection, after quoting from the *Morton* case (R. 30–31):

> I am unable to bring to mind any public interest which the court could have had in

> contemplation other than the public interest in the maintenance of a system of free competition. The misconduct which disqualified the plaintiff in the *Morton* case from enforcing his patent right was interference with the system of free competition. True enough the disposition made by the court of the case rendered it unnecessary for it to consider whether the restraint upon trade was undue or unreasonable or whether the lessening of competition was substantial. But clearly a petty or merely nominal offense against the public interest would hardly justify the court in withholding its aid to the holder of the patent.

We think that the cases which hold this type of restriction to be "contrary to public policy," which means the policy against restraining competition, are dispositive of the argument that the restraint may be "reasonable" under the Sherman Act. If the policies underlying the Sherman Act and the cases refusing to afford judicial assistance to the extension of the patent monopoly are the same, a restriction can hardly be contrary to public policy (*Morton Salt* case, *supra*, p. 19), or subversive of public policy (*Mercoid* cases, 320 U. S., at 684), or prejudicial to "an important public interest" (*Mercoid*, p. 670), and yet reasonable under the Sherman Act.

3. The Miscellaneous Facts Stressed by Appellant Cannot Justify the Tying Clauses

Appellant argues that the facts alleged in its answer, which are admitted to be true for pur-

poses of the motion for summary judgment, raise an issue of fact as to the reasonableness of the restraint. We shall show that none of the facts upon which appellant relies is material, or sufficient to overcome the weight of the factors to which we have already referred.

(a) Appellant argues (Br. 30–31) that thirteen of the Lixator leases contain either no restrictions or less arduous restrictions than the others, and that it does not appear how much of the salt was sold to these lessees. But even if there had been nothing at all improper in thirteen out of over 900 leases, this would not be a defense. Nor does the answer allege or even imply that these thirteen machines used such a disproportionately large share of the 119,000 tons of salt sold to appellant's lessees as to affect the case in a material way. The obvious inference from the admitted facts, in the absence of anything explicit on the point, is to the contrary.

(b) Appellant objects (Br. p. 31) that there is no showing of the amount of salt sold by competitors to appellant's lessees. This also is immaterial.[10] Appellant is merely saying that the

[10] Nor is the quantity of salt sold by appellant's competitors important in other respects. See *United States* v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 765 (C. C. A. 6), in which the court said:

> The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined.

See p. 16, *supra*, 47–48 *infra*.

extent to which it enforced or failed to enforce its leases is one of the controlling factors in determining violation. But failure to enforce tying agreements gives no immunity and is no defense in an antitrust case, as was expressly held in *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 458. The leases are on their face contracts "in restraint of trade". And it is not to be assumed from the allegation that "in many instances" (R. 17) lessees purchased salt from other sources that the contractual restraint was generally disregarded. Appellant has made no such allegation.

(c) Apparently for the purpose of showing that the restriction does not affect prices; appellant refers (Br. pp. 32–33) to the provisions in the Lixator agreement for a price reduction in case of a "general reduction" in prices, with the privilege of buying in the open market if appellant does not meet the general reduction, and to the provision in the Saltomat agreement that if there is "a general reduction in the Lessor's price" the lessee shall be given the benefit thereof. The Saltomat lease clearly does not provide for meeting a competitive price, and even as to the Lixator, the provision for meeting a "general reduction" does not establish effective price competition. But in any event the restriction here involved is unlawful because it serves to exclude competitors from the market whether or not it directly affects prices as well.

(d) Appellant urges (Br. p. 33) that it has not refused to install its machines because the lessees objected to signing the restrictive form, and that although "in many instances" licensees have purchased salt from other sources to appellant's knowledge, appellant has made no effort to enforce the restraint by removing the machines. But the fact that appellant has not imposed the restriction in all instances but only in a substantial number does not make it any the more reasonable or less restrictive (except in volume) of the competition of those who would otherwise have sold to the licensee. In *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 464, the Court specifically rejected the argument that the offer of "an alternative lease * * * free from the objectionable conditions" was a justification for the other leases.

Nor does the fact that appellant has not enforced the restriction when it was violated make a difference. In the first place the restriction in and of itself would impel most of the licensees who had agreed to it to comply without the need for enforcement. In the second place appellant must have known that any attempt to enforce would have been futile, in view of this Court's decisions. See cases cited *supra,* p. 17. Obviously, the cases holding such restrictions unenforceable because contrary to public policy, and thereby preventing appellant from instituting proceedings for enforcement, cannot serve as the

basis for an argument that tying clauses are not unreasonable under the Sherman Act.

As Judge Rifkind said in the *National Lead* case (63 F. Supp. 513, 526, affirmed June 23, 1947):

> But these contracts, being in restraint of trade and violative of the anti-trust laws, were never enforcible. If the non-enforcibility of the contract were to render an action under the anti-trust laws moot, we would face the absurd result that only innocent combinations would remain available for judicial scrutiny.

Furthermore, the *United Shoe Machinery* case, 258 U. S., at 458, in rejecting a similar contention, declared that "the fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act."

(e) Appellant argues (Br. pp. 34–36) that, because its salt contains a smaller percentage of impurities, the restrictive clauses of the leases are necessary for the satisfactory operation of the machines and the protection of appellant's good will. It is first necessary to analyze the record on this point. The portion of the record to which appellant refers does not establish that the machines will work only with appellant's salt. As to the rock salt used in the Lixator, appellant has averred in its answer (R. 17–18):

> * * * that the rock salt produced by other mining concerns does *not run con-*

> *sistent* in sodium chloride content and *in many instances* runs as low as 95% of sodium chloride. * * * If another salt *with a lower sodium chloride content and with more impurities* is used in such Lixator, it will require an alteration in the control of the sludge disposal, if the Lixator is to operate *in a satisfactory manner*, * * * [and] will affect adversely the amount of concentrated brine produced by the Lixator. [Italics supplied.]

As to the Saltomat it is alleged (R. 18) that salt with a minimum of calcium sulphate is superior, since that chemical impurity causes a hardening of the skin of canned vegetables. It is not alleged that other producers do not sell salt containing an equal proportion of calcium sulphate, but only that users of the machine will "have a more successful experience" if they use appellant's salt tablets (R. 18).

In addition, the answer must be read as a whole, and other allegations make it clear that salt produced by others can be used in the machines. For appellant has also averred that (R. 17):

> Moreover, in many instances lessees of the Lixator and of the Saltomat have purchased rock salt and salt tablets for use in such Lixator or Saltomat respectively from sources other than the defendant * * *.

Indeed the standard form of Lixator lease provides that if at any time there is a "general reduction in price of *grades of salt suitable* for use

in" the Lixator and the appellant fails or is unable to provide "a competitive grade" of salt at such price, the Lessee, upon continued payments of rental, "shall have the privilege of continued use of the said equipment with salt purchased in the open market." (R. 11.) Five of the Lixator leases permit the lessees to use their own salt, and three to buy 50 per cent of their salt requirements from appellant's competitors (R. 28, note 3). If defendant's allegations are read in their entirety and in the light of the undisputed provisions of the contracts, as they must be, they obviously do not mean that the machines will not work with salt produced by others, but, at most, that such salt is likely to be inferior to appellant's and that on the whole the machines will give more satisfactory service if appellant's salt is used."

The alleged harm which would result to appellant if its salt is not used consists of loss of good will, which obviously means the good will of the licensees themselves, inasmuch as the consuming public will not know whose machines or whose salt are used. A similar contention as to "tying clauses whose purpose and effect are to protect the good will of the lessor in the leased machines", was rejected in *International Busi-*

[11] This Court has wisely observed that "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price." *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27, 32n; *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 139.

ness Machines Corp. v. *United States*, 298 U. S. 131, 138–140, even though it was there stressed by the company that the failure of the cards used in the machines "even though occasional, to conform to these requirements, causes inaccuracies in the functioning of the machine, serious in their consequences and difficult to trace to their source, with consequent injury to the reputation of the machines and the good will of the lessors * * *" (298 U. S. at 139.) In meeting this contention the Court stated, in language equally applicable here (*id.*, at 139–140): "Appellant is not prevented from proclaiming the virtues of its own cards or warning against the danger of using, in its machines, cards which do not conform to the necessary specifications, or even from making its leases conditional upon the use of cards which conform to them. For aught that appears such measures would protect its good will, without the creation of monopoly or resort to the suppression of competition."

Furthermore, any attempt to justify tying restrictions on good will grounds in situations where patents are involved, even if meritorious standing alone (which is not the case here), must be rejected on the grounds stated by this Court in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. at 666: "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly." See *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498;

Radio Corp. v. *Lord*, 28 F. 2d 257, 260 (C. C. A. 3), certiorari denied, 278 U. S. 648; *Judson L. Thompson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952, 957 (C. C. A. 1), certiorari denied, 326 U. S. 776. However desirable it may be in the private interest of the patentee to protect his "good will", such desire cannot justify an act which is contrary to public policy, i. e., extension of the patent monopoly to cover unpatented materials.[12] It is up to the patentee to find some other less objectionable means of protecting his good will.

C. THE FACTS OF RECORD SHOW THAT THE RESTRAINT IS UNREASONABLE

The District Court found that, even if the type of restraint here involved was not unlawful *per se*, the undisputed facts of record were sufficient to show that the restraint was unreasonable.

Appellant admits that its business is interstate (R. 14, 15) and that it is the largest producer of salt for industrial use in the United States. In 1944 it sold approximately 119,000 tons of salt having an approximate value of $500,000, for use in the Lixator and Saltomat machines. At the time this action was before the District Court there were in effect 73 leases covering 96 Salto-

[12] Even the protection of the public health or quality of the product by a patentee has been held not to justify misuse of a patent. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459–460; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.

mats, all in the standard form which requires the lessee to purchase all the salt tablets used in said Saltomats from appellant (Complaint, Appendix A; R. 11–12), and 840 leases, each covering one Lixator machine, 790 of which are in the standard form requiring the lessee to purchase all the rock salt used in said Lixators from appellant (Complaint, Appendix B; R. 12–13).[11]

Whether or not the type of restraint is unlawful *per se*, these facts show that appellant has excluded all other salt producers from competing for a large amount of business. By any test this is an "appreciable part" of commerce and is thus clearly sufficient upon which to base a violation of the Sherman Act. See the *Yellow Cab* case, p. 16 *supra*. The District Court declared in this connection (R. 32–33):

> The other is that a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face substantial.
>
> * * * The intent and object of the Lixator and Saltomat leases were manifestly to exclude defendant's competitors from at least one portion of the business of the 900 lessees. * * *

[11] Of the 50 Lixator leases which vary from the standard form, in most instances the modifications are of little or no importance, all but four containing tying clauses requiring the purchase of some or all of the rock salt from appellant (see R. 28).

> Moreover, an analysis of the prices reflected in the 50 Lixator agreements which have been submitted, shows a nominal annual rental of $1 in 13 instances, and no rental other than "good and valuable consideration" in 3 instances. In all Saltomat leases there is provision that, after the lapse of five years, rental shall be at the nominal amount of $1. The same is true in all Lixator leases, with the exception of six instances. In these cases, therefore, the only valuable consideration which the lessor obtained is the lessee's promise to buy unpatented salt from the lessor. *In other words, the patent is being used solely to restrain competition.*

The use of a patent to restrain competition in this manner is clearly unlawful unless justified by circumstances showing the restraint not to be unreasonable. The circumstances upon which appellant relies are those discussed *supra,* pp. 34–41. For the reasons there set forth those facts do not justify appellant's conduct.

II

THE RESTRICTIVE AGREEMENTS ARE VIOLATIVE OF SECTION 3 OF THE CLAYTON ACT

Section 3 of the Clayton Act, so far as it is applicable to the present case, provides that "it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease * * * machinery * * * whether patented

or unpatented, for use * * * within the United States * * * on the condition * * * that the lessee * * * shall not use * * * supplies or other commodities of a competitor * * *, where the effect of such lease * * * or such condition * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appellant argues that its leases are not literally within the prohibition of Section 3 inasmuch as they do not prohibit the lessee from using salt purchased from competitors, but only from using such salt in appellant's machines. Practically identical contentions have been repeatedly rejected by this Court and the circuit courts of appeals. In the *International Business Machines* case, in meeting the same point, the Court stated (p. 135):

> Little need be said of the contention that the condition of appellant's leases does not infringe these prohibitions. It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition op-

erates in the manner forbidden by the statute."[14]

The *United Shoe Machinery* case emphasizes that it is the "practical effect of" the provisions, not their specific language, which determines whether the Clayton Act is violated. For decisions to the same effect in the lower courts see *Radio Corporation* v. *Lord*, 28 F. 2d 257, 261 (C. C. A. 3), certiorari denied, 278 U. S. 648; *Signode Steel Strapping Co.* v. *Federal Trade Comm.*, 132 F. 2d 48 (C. C. A. 4); *Judson L. Thompson Mfg. Co.* v. *Federal Trade Comm.*, 150 F. 2d 952, 955–956 (C. C. A. 1), certiorari denied, 326 U. S. 776. It is thus clear that the tying clause used in this case involves a type of restraint prohibited by Section 3.

Appellant's primary contention (brief, p. 18) seems to be that on this record Section 3 cannot be held applicable because there is a disputed issue of fact as to whether the leases "do not in fact substantially lessen competition or tend to create a monopoly in salt".

Section 3 requires only that the effect of the tying clause *"may be"* to substantially lessen competition or, that it *"may * * * tend* to create a monopoly". With appellant we accept the test as stated in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346–357, which

[14] In that case, as in this one, there was nothing to prevent the lessee from also leasing machines from other manufacturers and from using other cards in such machines.

emphasizes the word "may", but declares that "it was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or create an actual *tendency* to monopoly", not "to reach every remote lessening of competition". Nevertheless even with this limitation, it is clear that the word *may* is to be given important effect and that actual proof of decreased competition or monopoly is unnecessary.

The agreed facts show that the tying clause in this case extends to over 900 machines, affecting 119,000 tons of salt, and that the appellant is the largest seller of salt for industrial uses in the United States. These facts certainly support the conclusion that the effect of the restriction would be "probably" to lessen competition or to create a tendency toward monopoly. On the face of the agreements it would seem clear that *all* competition in the sale of salt for use in the machines would be eliminated, and that appellant would completely monopolize it. Even if as alleged in appellant's affirmative defense (R. 16–19), some salt is sold by others for use in the machines, despite the agreements, it would still be unquestionable that the agreements lessened competition in a substantial sense and *tended* to create a monopoly, whether or not competition was completely destroyed and a monopoly created. It is significant that in the *United Shoe Machinery* case this Court stated (258 U. S., at 457) "that such restrictive and tying agreements must nec-

essarily lessen competition and tend to monopoly is, we believe, equally apparent."

Nor can it be urged that the quantity of commerce affected is insufficient to warrant application of the Clayton Act. 119,000 tons and a $500,000 business, carried on by the largest producer in the general field, is not insubstantial. Just as under the Sherman Act (see *Yellow Cab* case quoted, *supra,* p. 16), so under the Clayton Act it is sufficient that the restraint or monopoly relate only to a portion of an industry. Thus in *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.,* 83 F. 2d 764 (C. C. A. 6), the court held the Clayton Act violated by a company whose business totalled $325,000 out of a total industry of $66,000,000. The Circuit Court of Appeals there aptly stated (at 766):

> * * * Manifestly there may be monopoly of a defined subdivision of an industry, as of the industry itself. * * *
>
> The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined. * * * The defendant is possessed of patents. Such patents grant it a limited monopoly, limited as to time and as to the articles or processes precisely covered by the claims. Within such limitations its monopoly is exclusive and complete—there is no unoccupied area. * * * If we may assume,

> as we do, that monopoly of a defined portion of an industry is equally subject to the condemnation of the anti-trust laws as is a monopoly over an entire industry, then it requires in this case no statistical demonstration of monopolistic practices, for the patents themselves, which define the metes and bounds of the monopoly lawfully granted, likewise define the metes and bounds of the monopoly here sought and achieved by the assailed contracts. * * *

"If a dealer by such unfair trade practice as is here involved restrains competition with respect to his customers, he ought not be permitted to continue it because his portion of the national business is small; and we do not think that such was the intention of Congress in the requirement of the Clayton Act that the lessening of competition be substantial." *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48, 54 (C. C. A. 4); see also *Fashion Originators Guild* v. *Federal Trade Commission,* 114 F. 2d 80, 85 (C. C. A. 2), affirmed, 312 U. S. 457.

Even if it be assumed, as the trial court did assume (in the absence of anything in the record on the point), that there are other machines available to perform similar functions,[15] the result would be the same. Obviously the other machines would not be identical with appellant's, inasmuch as appellant's machines are patented. Presuma-

[15] See note 8, p. 26, *supra.*

bly appellant's lessees chose appellant's machines because they thought them preferable. Once they had made that choice, the tying clause prevents competition between those who would sell salt to them and appellant. The *International Business Machines* case involved a similar situation, inasmuch as it appeared that Remington Rand made competitive machines. The Court did not regard this fact as material.[16] The Clayton Act prohibits tying clauses in connection with unpatented as well as patented machinery, and with respect to the former there would frequently be competition with machinery produced by others.

III

PARAGRAPH VI OF THE JUDGMENT IS NECESSARY TO INSURE ADEQUATE RELIEF. THERE WAS NO ABUSE OF THE DISCRETION OF THE DISTRICT COURT

The appellant urges that, in any event, Paragraph VI[17] of the judgment (R. 38–39) should be

[16] The manufacturers of business machines had originally entered into an agreement not to compete with each other in the sale of tabulating cards, but had consented to a decree cancelling the agreement. 298 U. S., at 132. The Court did not treat this fact as of consequence in dealing with the merits of the case.

[17] Paragraph VI provides as follows:

> Defendant International Salt is directed to offer to lease or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph

modified or eliminated. It is our position that Paragraph VI in its present form is necessary to insure adequate relief and that its inclusion represents a proper exercise of discretion by the District Court. Paragraph VI printed in full in the note below, requires appellant to offer to lease, sell or license machinery covered by the patents here in issue on non-discriminatory terms, provided that machines are available, that appellant is offering to lease, sell or license them, that it need not dispose of or license the machines without cash payment or adequate security, and that

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II hereof, to any applicant on non-discriminatory terms and conditions; provided that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

prices or royalty rates may differ as to different types and sizes of the machines and from time to time, so long as they are uniform at any one time as to each size and type. Persons now leasing machines are to have an election to retain the present arrangement or to enter into a new one under the paragraph.

The purpose of Paragraph VI was to prevent appellant from giving preference in the distribution of its machines to those who buy salt from it. The provision is positive relief designed to prevent appellant from using its ownership of the machines to force the purchase of its salt. Appellant has followed an illegal course of business in that regard for many years, and the trial court thought positive relief of this kind necessary to insure the future elimination of the unlawful practice. Such a provision is essential if the prohibition against the tying of the salt to the machines is to be made effective. A mere injunction against discrimination, such as appellant has proposed as an alternative, would not suffice, since it would require an inquiry into the motives of appellant in accepting or refusing applications for machines. The presence of a particular motive is not hard to conceal, and the enforcement of a general injunction against discrimination would be much more difficult if it necessitated an investigation into the motive behind the choice of customer and the terms in each case. The affirmative requirements of Paragraph VI are thus much sim-

pler for the trial court to supervise and police. They assure fair non-discriminatory treatment of existing lessees and of new applicants.[18]

Paragraph VI affirmatively requires the offering of machines on a non-discriminatory basis so long as appellant has and wishes to offer such machines for distribution, and subject to qualifications which protect appellant against disposal to bad credit risks and which allow differentiation between varying types and sizes. This does not harm appellant, since it permits appellant to decide whether it wishes to distribute machinery, and the price, so long as it treats all customers equally. No forfeiture or confiscation is involved. Appellant will receive compensation for a lease, sale or license of the machine. It merely protects present and future lessees, licensees or purchasers from abuse of appellant's position as lessor, licensor or vendor of the machine. The appellant is the largest producer of salt for industrial use in the United States. It has abused its patent rights. The public is entitled to protection against similar abuses in the future.

The judgment in an antitrust case must be moulded to the exigencies of the particular case. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 470, 474; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185. It should be de-

[18] The provision was included in the decree by the trial court as a less drastic alternative to the Government's request for compulsory licensing.

signed effectively to neutralize the continuing effects of the unlawful activity and prevent its recurrence. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308; *Standard Oil Company* v. *United States*, 221 U. S. 1, 77–78; *Local 167* v. *United States*, 291 U. S. 293, 299; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 726; *United States* v. *Crescent Amusement Co.*, *supra*. "It should be broad enough to prevent evasion," and any doubts should be resolved against the wrong-doers and in favor of those the Act seeks to protect. *Local 167* v. *United States*, *supra*, 299.

There is a wide range of discretion in the District Court, and where the findings of a violation of the antitrust laws are sustained, the Court will not direct a modification of the decree except on a showing of abuse of discretion. *United States* v. *Crescent Amusement Co.*, *supra*, 185. As this Court declared in *United States* v. *National Lead Co.*, No. 89, 1946 Term, decided June 23, 1947, in approving the "commendable fairness" with which the same District Judge as here had fashioned the decree in that case (p. 12), "the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was to make the remedy as effective as possible."

Appellant complains (Br. p. 40) that in some sections of the country it might be necessary for

it to charge an unusually low rental in order to compete with other manufacturers, and that if it cannot reduce the rates to meet such competition, competition in those sections would be lessened rather than maintained. The District Court has power under Paragraph VIII of the decree to authorize appellant to deal with such a problem if it should arise.[19]

Appellant compares Paragraph VI to the provision in the *Hartford-Empire* decree, eliminated by this Court (323 U. S., at 412), which forbade any disposition or transfer by the defendant of patented glassware machinery other than by outright sale at reasonable prices to be approved, if necessary, by the court. But here appellant may sell, lease, or license, or refrain from doing so, and may fix its rates and prices pursuant to its own business judgment, subject to the sole limitation that it treat all customers equally. The provision in the *Hartford* decree was much more severe, and the reasons for its limitation by this Court thus have no relevance here.

Appellant also cites *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728, wherein this Court refused to require defendant to sell its product

[19] If the need arose the Government would not oppose permitting appellant to charge a lower price in order to meet, in good faith, the equally low price of a competitor. Inasmuch as appellant retains the right to lower its prices uniformly, this contingency can only arise if appellant is faced with competition restricted to a particular section of the country.

without discrimination to any person offering to pay cash. In that case no patented commodity was involved and other manufacturers produced two-thirds of the total supply of the type of lenses in issue. 321 U. S., at 710. Potential customers thus had the option of obtaining the identical product from other sources. Clearly the decision in that case upholding the exercise of the discretion of the same district judge in refusing such a provision does not require this Court to hold that the court below in this case abused its discretion in providing a less drastic prohibition of discrimination.

Here appellant has a patented machine, not obtainable elsewhere, and, as there is no compulsory licensing, it may not be obtainable elsewhere until the patent expires. In the absence of an effective non-discriminatory provision, it may still be possible for appellant, if it so desires, to adopt a business practice which may enable it to use its patent position to give itself an unfair competitive advantage in the sale of salt. While it may avoid express imposition of the restrictions it has imposed in the past, it might still give sufficiently more favorable terms to those who buy its salt than to those who do not, as to defeat completely the purpose of the present decree. One of the effective safeguards against such actions would be a requirement that appellant license its patents, thereby enabling others to furnish the patented machines on fair terms if

appellant does not. The Government asked this as part of the decree, but the request was refused. Denial of that remedy leaves the non-discrimination provisions of Paragraph VI as the only practical protection to which one who desires to use appellant's machines, but not its salt, can look.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

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OCTOBER 1947.

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SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1947.

International Salt Company, Incorporated, Appellant, v. The United States of America.	Appeal from the District Court of the United States for the Southern District of New York.

[November 10, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

The Government brought this civil action to enjoin the International Salt Company, appellant here, from carrying out provisions of the leases of its patented machines to the effect that lessees would use therein only International's salt products. The restriction is alleged to violate § 1 of the Sherman Act,[1] and § 3 of the Clayton Act.[2] Upon appellant's answer and admissions of fact, the Government moved for summary judgment under Rule 56 of the Rules of Civil Procedure, upon the ground that no issue as to a material fact was presented and that, on the admissions, judgment followed as matter of law. Neither party submitted affidavits. Judgment was granted[3] and appeal was taken directly to this Court.[4]

It was established by pleadings or admissions that the International Salt Company is engaged in interstate commerce in salt, of which it is the country's largest producer for industrial uses. It also owns patents on two machines for utilization of salt products. One, the "Lixator," dissolves rock salt into a brine used in various industrial processes. The other, the "Saltomat," injects salt, in tab-

[1] 26 Stat. 209, § 1, 15 U. S. C. § 1.
[2] 28 Stat. 730, § 3, 15 U. S. C. § 14.
[3] 6 F. R. D. 302.
[4] Probable jurisdiction noted April 28, 1947.

let form, into canned products during the canning process. The principal distribution of each of these machines is under leases which, among other things, require the lessees to purchase from appellant all unpatented salt and salt tablets consumed in the leased machines.

Appellant had outstanding 790 leases of an equal number of "Lixators," all of which leases were on appellant's standard form containing the tying clause[5] and other standard provisions; of 50 other leases which somewhat varied the terms, all but 4 contained the tying clause. It also had in effect 73 leases of 96 "Saltomats," all containing the restrictive clause.[6] In 1944, appellant sold

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[5] "It is further mutually agreed that the said Lixate Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, provided:

"If at any time during the term of this lease a general reduction in price of grade of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payments of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price."

It further provides as follows:

"Should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirement of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 30 days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee."

[6] "It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the

approximately 119,000 tons of salt, for about $500,000, for use in these machines.

The appellant's patents confer a limited monopoly of the invention they reward. From them appellant derives a right to restrain others from making, vending or using the patented machines. But the patents confer no right to restrain use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the anti-trust laws. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680.

Appellant contends, however, that summary judgment was unauthorized because it precluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, *per se*,

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term of this lease; that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, Provided: If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

The lease further provides:

". . . should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 10 days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee."

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. *Fashion Originators Guild* v. *Federal Trade Commission*, 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

Appellant contends, however, that the "Lixator" contracts are saved from unreasonableness and from the tendency to monopoly because they provided that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price; and the "Saltomat" agreements provided that the lessee was entitled to the benefit of any general price reduction in lessor's salt tablets. The "Lixator" provision does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision. The "Saltomat" provision obviously has no effect of legal significance since it gives the lessee nothing more than a right to buy appellant's salt tablets at appellant's going price. All purchases must in any event be of appellant's product.

Appellant also urges that since under the leases it remained under an obligation to repair and maintain the machines, it was reasonable to confine their use to its own salt because its high quality assured satisfactory functioning and low maintenance cost. The appellant's rock salt is alleged to have an average sodium chloride content of 98.2%. Rock salt of other producers, it is said, "does not run consistent in sodium chloride content and in many instances runs as low as 95% of sodium chloride." This greater percentage of insoluble impurities allegedly disturbs the functioning of the "Lixator" machine. A somewhat similar claim is pleaded as to the "Saltomat."

Of course, a lessor may impose on a lessee reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation. We may assume, as matter of argument, that if the "Lixator" functions best on rock salt of average sodium chloride content of 98.2%, the lessee might be required to use only salt meeting such a specification of quality. But it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone except International. If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor. Rules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet. *Cf. International Business Machines Corp.* v. *United States*, 298 U. S. 131.

Appellant urges other objections to the summary judgment. The tying clause has not been insisted upon in all leases, nor has it always been enforced when it was included. But these facts do not justify the general use of the restriction which has been admitted here.

The appellant also strongly objects to the provisions of the sixth paragraph of the decree.[7] Appellant denies the necessity for such provision and it is true that the record discloses no threat to discriminate after the judgment of the Court is pronounced. It also suggests that we modify the judgment to accept a proposed alternative provision[8] similar to one it says it urged upon the District

[7] Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

[8] Defendant would be enjoined "from refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation, against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."

Court, which rejected it. The record does not show what proceedings were had between rendering of the court's opinion and signing of the decree.

The specific ground of objection raised by appellant to paragraph sixth is that International may find it necessary in some sections of the country to reduce the rental rates of the machines in order that its machines may compete with those of others. Of course, the Clayton Act itself * permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose.

The short of the contention is that since the company never has threatened to violate any decree entered in this case to restrain future use of the illegal leases, it feels that the provision invalidating the objectionable leases should end the matter and that, as to any additional provisions, appellant is entitled to stand before the court in the same position as one who has never violated the law at all—that the injunction should go no farther than the violation or threat of violation. We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the

* 38 Stat. 730, 49 Stat. 1526, 15 U. S. C. § 13b.

purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur.

The framing of decrees should take place in the District rather than in Appellate Courts.[10] They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *United States* v. *National Lead Co.*, — U. S. —. In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of "enabling any of the parties to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the judgment" and "for the amendment, modification or termina-

[10] That court is authorised, but not required, to call upon the Federal Trade Commission to assist in framing decrees in antitrust cases. § 7, Federal Trade Commission Act, 38 Stat. 722. This would seem unnecessary if Congress intended a simple prohibition of the particular practice proved before the court. It indicates the Congress has intended decrees to deal with the future economic condition of the enterprise as well as past violations.

tion of any of its provisions. . . ." We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below and deny the relief here, upon the present state of the record, without prejudice.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1947.

International Salt Company, Incorporated, Appellant, v. The United States of America.	Appeal from the District Court of the United States for the Southern District of New York.

[November 10, 1947.]

Mr. Justice Frankurter, whom Mr. Justice Reed and Mr. Justice Burton join, dissenting in part.

Agreeing wholeheartedly with the Court's opinion on the main issue, I am left unpersuaded by its justification for retaining Paragraph VI [1] in the judgment.

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[1] VI

Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat Machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

Inasmuch as the holder of patents on machines is not obliged to dispose of them to all comers or to do so at a uniform price, Paragraph VI in and of itself undoubtedly deprives appellant of a legal right. It is not merely a theoretical right. Practical considerations may make it important for appellant to act upon its legal right not to have a uniform price for all its customers. It was conceded at the bar that competition may require this. No doubt, when a court condemns practices as violative of the Sherman Law and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of antitrust legislation, restraint of such acts in the future is the adequate relief. See *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77; *Labor Board* v. *Express Publishing Company*, 312 U. S. 426, 435–37. Reflecting the dictates of fairness, equity does not put under ban that which is intrinsically legitimate unless for all practical purposes it is tied with the illegtimate, or the circumstances of the case makes it reasonable to assume that pursuit of what is legitimate would be a cover for doing what is forbidden.

The Government argues, in effect, that to compel appellant to observe uniformity of price for its machines removes any temptation for more favorable treatment of a customer who buys its salt. But that is precisely the aim of the main decree—it prohibits extension of the patent for the machines by requiring as a condition of its acquisition the purchase of non-patented salt. The presupposition of Paragraph VI is that the appellant will disobey that which the court explicitly forbids, so that the with-

drawal of an otherwise legal right to fix the purchase price of patented machines is employed as a precautionary screw to hold the appellant down from disobeying the court's decree. Surely a court of equity ought not to add to its prohibition of the illicit a prohibition of the licit unless the two are practically intertwined or there is some ground for believing that the licit will surreptitiously be misused in order to accomplish the illicit. There should be no such prohibition merely as a re-enforcement of the appropriate presupposition that a litigant, not shown to have been recalcitrant or underhanded, will obey the court's decree. If he does, the power of contempt is there to enforce obedience. It is suggested that if the presupposition of obedience is to be entertained it is unnecessary to enjoin even illegal conduct. But, surely, it is one thing to decree prohibition of conduct found to be illegal and a wholly different thing to add thereto the prohibition of that which is otherwise legal on the theory that thereby any temptation to persist in the forbidden illegality is removed.

Upon the record before us there is nothing to suggest that the appellant is likely to disobey the decree not only of the District Court against a continuance of illegal leases, but what in effect, upon affirmance, becomes a decree of this Court. It must be remembered that the Government saw fit to move for judgment on the pleadings. It thereby raised a pure legal question as to the validity of the leases on their face. The Government chose not to try to lay bare, as is often done in Sherman Law cases, fair and unfair practices inextricably blended. In such a situation the lawful has to fall with the unlawful. Having invited judgment on the bare bones of the pleadings which merely raise the validity of the tying clauses, the Government is not entitled to remedies which go beyond the justification of the pleadings. The Gov-

ernment ought not to have it both ways. The Government is not entitled to a provision in the decree which can be justified only on some indication in the record, of which here there is none, that appellant's past shows a devious temper which needs to be hobbled by withdrawing a conceded legal right.

In comparable situations, where orders of the Federal Trade Commission come here for review, this Court has sought to protect otherwise legitimate rights even where a business has indulged in unfair methods of competition. The Commission is not authorized to make its order needlessly destructive. The baby is not to be thrown out with the bath. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, and *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608. Accordingly, if this were a review of an order of the Federal Trade Commission, I should remit the order for appropriate reconsideration by the Commission. Since this is a review of a lower federal court and the record presumably presents to us all that was before the District Court in support of Paragraph VI, we could dispose of the matter here.

But the molding of decrees in Sherman Law cases is normally the business of district courts. They have a scope of discretion which should not unduly be cut off by a recasting of the decree on appeal here. (It is worth noting that the availability of the Federal Trade Commission in the role of a master in chancery to help mold decrees in suits under the anti-trust statutes apparently does not apply to a suit like the present, where judgment was asked on the pleadings and no testimony was taken. See § 7 of the Federal Trade Commission Act, 38 Stat. 717, 722, 15 U. S. C. § 47.) And so I would remand the case to the District Court. It has been suggested that Paragraph VI is merely a roundabout way of saying that the appellant should not discriminate in the price of its

patented machines in favor of a purchaser of its salt. If such was the intention of Paragraph VI, the District Court will want to convey such meaning less ambiguously.[2]

As the paragraph stands, I do not see how any lawyer would advise that the appellant could vary its prices among customers in different localities for a legitimate reason without each time going to the District Court for a modification of the decree. That is not a burden which, on this record, ought to be placed on the appellant. The undue sting of Paragraph VI is not saved by the fact that it is "specific." Of course it is in the interest of courts and of litigants that the terms of a decree be as specific as possible. But the desideratum of explicitness does not dispense with the requirement that remedies be appropriate to the condemned illegality. It does not draw the sting of undue prohibition of lawful conduct to make the prohibition specific.

[2] See the clause which the appellant proposed to the District Court, enjoining it "from refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation, against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."